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Insolvency Law and Attempts to Prevent Abuse and Forum Shopping in the EU

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Introduction

In bankruptcy or insolvency law, no matter what the jurisdiction there may be the potential for abuse of the codified provision by actors seeking advantages in litigation. One of the most common forms of abuse is forum shopping. When a debtor or creditor has the ability to choose among forums that may have jurisdiction, naturally the party will want to go to the forum that will offer the best options as a matter of both procedural and substantive law. Of course, in an efficient legal system this would not necessarily be possible because there should be only one jurisdiction to open proceedings and deal with the matter at hand. In the European Union however, with a common internal market, freedom of establishment, and the free movement of capital and goods, debtors and creditors deal with each other across national lines, national law is the substantive law regarding insolvency proceedings under the E.U. Insolvency Regulation, with judgments being given effect in the other member states. So in a complex, diverse, and interconnected internal market, how does the European Union prevent forum shopping and abuse in insolvency proceedings?

This paper will examine the European Union's attempt to harmonize the opening and effect of insolvency proceedings through two regulations, Regulation 1346/2000, having gone into effect in 2002 and in force until 2017, and the newly passed but yet to take effect Regulation 2015/848. The regulations purport to combat forum shopping, but an examination of their anti-abuse provisions show them to be vague and deferential to the various case law based upon of the Court of Justice of the European Union's (CJEU) interpretation of the provisions. The vagueness of Regulation 1346/2000 left a very real

potential for forum shopping in the E.U. There was a great opportunity to fix this situation in an ambitious review of the Insolvency Regulation that culminated in 2015's passage of Regulation 2015/848 (and the EU purported to want to combat abuse), but the new regulation basically repeated the old language and just codified the main CJEU rulings on the methods for determining jurisdiction.

In Section I, I will examine the background and history of attempts to harmonize insolvency law in the EU. The concern for the development of the internal market and the treaty development towards today's Treaty on the Functioning of the European Union (TFEU) eventually made this possible after much controversy and failed attempts. In Section II, I will explain the Insolvency Regulation, Regulation 1346/2000, describing its goals, its main anti-abuse provisions on forum shopping, the method for fixing jurisdiction, and the seminal cases handed down from the CJEU interpreting it. In Section III, I will describe the Insolvency Regulation's revision process and the changes that made it into the new regulation. In Section IV, I conclude by finding the EU failed to materially change anything related to forum shopping in the new regulation and simply deferred to the CJEU by codifying the cases it examined. This shows that though it recites its opposition to forum shopping and purports to prevent abuse in the regulations, there remains a large potential for abuse under the regulations.

I. Background and Concern for Harmonization of Insolvency Law

Insolvency law has been controversial for the many member states of the European Union under the current treaty and its predecessor treaties. Some areas of European Union Law are considered areas that are of "special concern" either due to the

national nature of the legal schemes or they are explicitly named as such in the Treaties. Insolvency law has a long history of being a national concern with the European Union. However, many commentators and the Commission itself felt that, like so many other areas of law, the E.U. needed some harmonization of insolvency law. For a robust and practical internal market to so work, some respect for common standards and managed expectations would curb abuses such as forum-shopping, the movement of assets across state lines, and ever-lingering litigation that could spread to any territory where an entity was established.

A. The Internal Market—History and Harmonization of other Fields

One of the great goals of the European Union as a project is the internal market. The internal market is conceptualized as an area of free movement for goods, people, services and capital, and it has been further developed since 1993 with the Treaty of Maastricht, the introduction of the Euro in large areas of the Union, and continued consolidation and coordination of Union policies.¹ Enshrined in the Preamble of Treaty on the Functioning of the European Union, the “Constitution” of the E.U., is the declaration that the Member States were “Anxious to strengthen the unity of their economies and to ensure their harmonious development...” and “Desiring to contribute, by means of a common commercial policy, to the progressive abolition of restrictions on international trade.”² Through legislative action prescribed by the Treaty and the actions of the Member States’ national legislatures, the European Union boasts that it has created a single market that has added to the prosperity of its members. The explicit goal and the

¹ *Commission Communication Regarding the Single Market Act*, at 3, COM (2011) 206 final (Apr. 13, 2011).

² Consolidated Version of the Treaty on the Functioning of the European Union Preamble, October 26, 2012, 2012 O.J. (C 326) 47, at 49 [hereinafter TFEU].

authority for the internal market is captured in the TFEU Article 26.³ The Commission, in a Communication to the other European Institutions, has boasted: “The message is clear, the evidence is there: a strong, deep and integrated Single Market creates growth, generates jobs and offers opportunities for European citizens which were not there 20 years ago.”⁴

To accomplish the ambitious project of the Internal market, the E.U. and its Member States must define standards of behavior and law to allow the freedoms that an Internal market can bring to E.U. States and citizens. The European Union has used the device of “harmonization” to achieve these effects and create the internal market. Harmonization has been used in Europe to assist in bringing about a common market since the 1957 European Economic Community Treaty.⁵ Harmonization, also translated as “approximation” or “to bring closer together”, is legislated through regulations, directives, decisions, recommendations, and opinions.⁶ A regulation is a law that is applicable and binding in all Member States directly; it does not need to be passed into national law by the Member States although national laws may need to be changed to avoid conflicting with the regulation.⁷ A directive is a law that binds the Member States, or a group of Member States, to achieve a particular objective—significantly, a directive specifies the result to be achieved: it is up to the Member States individually to decide

³ Id. at 59.

⁴ *Commission Communication Regarding the Single Market Act II*, at 4, COM (2012), 573 final (Oct. 3, 2012) .

⁵ Treaty Establishing the European Economic Community, March 25 1957, art. 3, 298 U.N.T.S. 11 at 15 [hereinafter EEC Treaty].

⁶ E.g., ROGER J. GOEBEL ET AL., CASES AND MATERIALS ON EUROPEAN UNION LAW 501-502 (4th ed. 2015).

⁷ European Commission, Directorate-General for Communication, *How the European Union Works; Your Guide to the EU Institutions*, 5, (2014), <http://bookshop.europa.eu/en/how-the-european-union-works-pbNA0414810/>.

how this is done.⁸ A decision can be addressed to Member States, groups of people, or even individuals; it is binding in its entirety.⁹ Recommendations and opinions have no binding force.

The Union gets its authority to legislate in certain areas, called “competences” from the TFEU. TFEU Article 3 lists those areas in which the E.U. has exclusive competence to legislate.¹⁰ Some areas are considered shared competences between the Union and the Member States.¹¹ There are also areas that are considered Member State competences, but which the E.U. can provide support and guidance.¹² Finally, the Member States are to “coordinate their economic policies within the Union.”¹³

B. Treaty Authority For an Insolvency Regulation

The first Insolvency Regulation, Regulation 2000/1346, was a long-time coming and faced many hurdles on its way to implementation. Some involved the concerns for traditional areas of national governance, and some hurdles involved Treaty and E.U. authority to implement such a regulation. After all, member states have evolved over the generations to produce their own legal traditions and economic expectations for handling business failures, each producing their own biases and interest groups.¹⁴ Indeed, the dream of a Europe-wide insolvency regime goes back to the 1960’s, but the founding

⁸ *Id.*

⁹ *Id.*

¹⁰ TFEU art. 3—includes the customs union, competition rules within the internal market, monetary policy for the countries that use the Euro as currency, preservation of marine life for fisheries, and the common commercial policy.

¹¹ TFEU art. 4—includes the internal market; economic, social, and territorial cohesion; and the area of freedom, security, and justice among many others.

¹² TFEU art. 6—includes: health, industry, culture, tourism, education, civil protection, and administrative cooperation.

¹³ TFEU art. 5.

¹⁴ Jon Hay, *Harmonising Insolvency Law-Nice, But Not Necessary*, GLOBALCAPITAL, May 19, 2015, at 3, available at ProQuest, File No. 1690226055.

treaty was completely silent on the topic. Due to a lack of mention of insolvency in the EEC Treaty, the Community filled the gap by using multilateral agreements on cross-border insolvency issues as was authorized under then Article 220 (now TFEU art. 65) of the EEC Treaty.¹⁵ A draft Insolvency Convention was proposed in the late 1960's at the same time as the Convention on Mutual Recognition on Judgments in Civil and Commercial Proceedings. The Mutual Judgments Convention was adopted in Brussels in 1968 (known as Brussels I), but it expressly excluded any judgments or court rulings having to do with insolvency or the winding up of companies.¹⁶ No action was taken on the draft Insolvency Convention and it was abandoned in 1985 as too ambitious.¹⁷

In 1989, a push for a new convention sprang up, and there was hope that the Maastricht Treaty would finally provide the Community with the power to bind all of the member states together in a European insolvency regime, but it failed to be passed in Denmark, the United Kingdom, and Ireland.¹⁸ (Later there would be an opt-in procedure for the Maastricht Treaty, which the U.K. and Ireland executed, but Denmark did not—for this reason Denmark is not covered by the successor to Brussels I or the eventual European Insolvency Regulation). One more attempt for a European Insolvency Convention occurred in 1995, but the draft convention needed all 15 of the member states to adopt it. All member states did, except the United Kingdom. The U.K. was enmeshed in an anti-E.U. political mood on the domestic front because of the ban on British beef

¹⁵ Peter Burbridge, *Cross Boarder Insolvency within the European Union, Dawn of a New Era*, 27(5) E.L. REV. 589, 591 (2002).

¹⁶ See Council Regulation 44/2001 on Jurisdiction and the Recognition and the Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L12) 1 (EC)

¹⁷ Burbridge, *supra*, at 591.

¹⁸ *Id.* at 589.

exports to prevent the spread of Mad Cow disease.¹⁹ The British never signed on and once again it seemed that harmonization of insolvency rules would be dead forever.

However, this was not the end of the story. Within five years the draft Convention would be reborn as a European Union regulation, directly applicable to all member states within two years of its passage and publication in the Official Journal. Ironically, the new regulation, Council Regulation 1346/2000, was substantially the same as the draft convention of 1995, but now the Court of Justice of the European Union would be able to rule on its provisions and interpret its meaning.²⁰

II. Regulation 1346/2000

Finally, the European Union, after almost forty years, achieved harmonization of some insolvency rules through a Council Regulation.²¹ The E.U. institutions passed the regulation on May 29, 2000 to go into effect two years after its publication in the Official Journal (effective May 31, 2002).²²

A. Goals of the Insolvency Regulation

More than anything, the Insolvency Regulation was about preventing abuse by allowing debtors to exploit differences in national insolvency laws to choose the most beneficial forum to liquidate in, to prevent the transfer of assets across the member states to the detriment of creditors, and to provide a harmonization of law to allow the internal

¹⁹ *Id.*

²⁰ Richard Parnham, The Trouble With EU Insolvency Regulation, 19 Euro Law. 26, 27 (2002).

²¹ Council Regulation 1346/2000, On Insolvency Proceedings, 2000 O.J. (L 160) 1 (EC).

²² Regulation 1346/2000 art. 47; *see also* GOEBEL ET AL., *supra* at 502 (harmonization is usually executed through directives, but it can also be done through regulations that go into effect at a later date, usually two years).

market to function at its full potential by managing expectations and giving common standards for creditors and debtors involved in distressed companies.

Regulation 1346/2000 relied on the Treaty on the Establishment of the European Community, as amended by the Treaty of Amsterdam.²³ Specifically, the Regulation relies on Articles 61(c) and 67(1) thereof.²⁴ The EC Treaty articles specifically authorize that “In order to establish progressively an area of freedom, security and justice, the Council shall adopt...measures in the field of judicial cooperation in civil matters...” and that “During a transitional period of five years following the entry into force of the Treaty of Amsterdam, the Council shall act unanimously on a proposal from the Commission or on the initiative of a Member State and after consulting the European Parliament.”²⁵ It is these two articles of the EC Treaty that gives the E.U. the authority to enact Regulation 1346/2000.

Regulation 1346/2000 had many goals that were both explicitly outlined in its recitals and which were implicitly necessary after so many years of the E.U. operating without any insolvency harmonization. Indeed, the latter informed the former. First and foremost, in the recitals the regulation clearly spells out the need for a harmonization of cross-border insolvency proceedings and the measures regarding a debtor’s assets for the proper function of the internal market.²⁶ The regulation continues into the next recital citing that abuse such as forum shopping and the transfer of assets and litigation are impediments to the proper functioning of the internal market and that the regulation will

²³ Treaty of Amsterdam, amending the Treaty on European Union, the Treaties on Establishing the European Communities, and Certain Related Acts, 1997 O.J. (C 340) 1 (hereinafter the Treaty of Amsterdam).

²⁴ Regulation 1346/2000, preamble.

²⁵ Treaty of Amsterdam art. 61(c) and art. 67(1) respectively.

²⁶ Regulation 1346/2000 recitals 2 and 3.

provide procedures to prevent these practices.²⁷ In a nod to the principle of subsidiarity, the 5th recital of Regulation 1346/2000 says, “These objectives cannot be achieved at a national level and action at a Community level is therefore justified.”²⁸ Finally, the regulation declares it is in accordance with the principle of proportionality, limiting its scope to the provisions governing the opening of insolvency proceedings and the judgments that are “closely connected” to them. It is also of note that the regulation was necessary because, as stated *supra*, insolvency proceedings were expressly excluded from Brussels I (Later Council Regulation 44/2001).²⁹ The mechanics the regulation uses to achieve its general anti-abuse and harmonization goals were the subject of some controversy and litigation over the next 10-13 years while it was effective before the beginning of debate on amending or changing the regulation, not finalized until May of 2015.

B. Methods, Effects, and Interpretations of Regulation 1346/2000

The principal method the regulation uses in its harmonization of insolvency laws is by establishing rules that govern where the proceedings are to be opened. This is to prevent the evils of forum shopping and the movement of assets and litigation across borders as may be expedient or beneficial to a debtor. While the regulation provides some detail about the opening and forum of the proceedings, there is much it didn’t say about how those rules are to be interpreted and hence left this to the CJEU to determine by way of case law.

²⁷ Regulation 1346/2000 recital 4.

²⁸ Regulation 1346/2000 recital 5.

²⁹ Regulation 1346/2000 recital 7; Regulation 44/2001 art. 2(b).

Forum shopping has two aspects. One is about pursuing litigation or opening proceedings where the plaintiff will have the greatest procedural or substantive advantage, or the defendant will have the greatest procedural or substantive disadvantage.³⁰ In the era of large multi-national firms with assets and connections to jurisdictions all over the world, this may lead to a full menu of forums to pursue insolvency proceedings, putting the various constituencies of creditors, managers, shareholders, employees, and others at distinct disadvantages. In the European Union, where businesses are free to establish, trade, hire, and raise capital across an internal market this is especially pronounced as entities can hide behind national law as they become distressed—reaping all the advantages of the internal market but being able to mitigate their accountability by choosing an advantageous forum to open court-protected insolvency proceedings.

The controls over forum shopping come in the form of respecting 2 forms of proceedings: the main proceedings, which will occur in the debtor’s “center of main interests”, and limited secondary proceedings which can occur where the debtor is established, but can only take up issues over assets in the jurisdiction of the secondary proceedings that are unreachable or impracticable to be settled via the main proceedings (also, these are limited to “winding-up” proceedings).³¹ There is to be respect for the judgments under the law of the jurisdiction of the main proceedings across the Union.³²

³⁰ Marek Szydło, *Prevention of Forum Shopping in European Insolvency Law*, 11 E.B.O.R. 253, 255 (2010).

³¹ Regulation 1346/2000 art. 3.

³² Regulation 1346/2000 art. 16.

As for choice of law, the national law of the member state where the proceedings are occurring, whether main or secondary, shall be the substantive law applied.³³

There are many questions left open by this overall framework. Firstly, it is interesting to note that the regulation does not define “insolvency”. In Article 2 it defines “insolvency proceedings” by way of referencing its own Annex A; what this does is give respect and effect to national law in the member states for what actually may be litigated or defined as an “insolvency proceeding”.³⁴ After that, the consolidation and respect for judgments arising out of a main proceeding is comforting as forcing an entity to proceed in the forum of its center of main interests (COMI), but this term is loosely defined within the regulation. Article 3 provides that COMI that “the place of the registered office shall be presumed to the [COMI] in the absence of proof to the contrary.”³⁵ The recitals provide further guidance: “The [COMI] should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.”³⁶ Clearly, though simply stated, neither of these definitions can provide sufficient stringency to ensure that there isn’t forum shopping abuse by the largest and most diversified entities operating across the E.U. At the very least these definitions make it a question that was ripe for litigation by those seeking the most beneficial forums to open proceedings.

³³ Regulation 1346/2000 art. 4.

³⁴ Regulation 1346/2000 art. 2(a). See also Annex A of the Regulation.

³⁵ Regulation 1346/2000 art 3(1).

³⁶ Regulation 1346/2000 recital 13.

C. Defining COMI—The *Eurofood* Case

A seminal case on COMI was the case of *Eurofood IFSC Ltd.*³⁷ Eurofood was a company with a registered office in Ireland. It was a wholly owned subsidiary of Parmalat SpA of Italy. In 2003, a massive financial and accounting fraud was unearthed within Parmalat and the company imploded. Parmalat had overstated assets and understated liabilities by €14.5 billion, by one estimate being larger than Enron and Worldcom combined.³⁸ In December 2003, the Italian authorities put Parmalat into an extraordinary administration. On January 27, 2004, Bank of America, a large creditor of the Parmalat Group and Eurofood in particular, applied in Irish court for a winding up of Eurofoods and the appointment of liquidator. The court granted this application on the same day, opening up insolvency proceedings for Eurofood under Irish law, with judgments meant to apply universally across the E.U. as is required by Regulation 1346/2000. Eurofood's registered office was in Ireland, so the presumption of its COMI was in fact Ireland—the main proceedings would have commenced.³⁹

However, the parent Parmalat was already under state administration in Italy. On February 9, 2004, Italian authorities admitted Parmalat's wholly owned subsidiary, Eurofood, into state administration. There were some procedural issues in the Italian courts, but by February 20, 2004 the Italian court had ruled that Eurofood's COMI was in fact at Parmalat's headquarters in Parma. This put the courts of Italy and Ireland in conflict over the jurisdiction of Eurofood. In fact, the Irish court held one other hearing

³⁷ Case C-341/04, *Eurofood IFSC Ltd*, 2006 E.C.R. I-03813.

³⁸ Bahram Soltani, *The Anatomy of Corporate Fraud: A Comparative Analysis of High Profile American and European Corporate Scandals*, 120 J. BUS. ETHICS 251, 263 (2014).

³⁹ *Eurofood IFSC Ltd*, at 3862-63.

in March 2004 reaffirming its belief that the COMI was in Ireland. The Italian administrator appealed to the Supreme Court of Ireland, and they referred the question to the Court of Justice: how does one determine the COMI of a debtor with a registered office in one member state, and to all outward appearances it operates there, but the parent has registered offices in another member state and has the ability to control the subsidiary?⁴⁰

The CJEU took note of the way the Irish referring court framed the question. Eurofood, according to the question, not only had its registered office in Ireland, but also operated and administered itself in a way that a third party would ascertain it was an Irish company.⁴¹ So this is not a case of Eurofood being an empty shell with only a post office box in Dublin. The CJEU also took note of the language of the regulation, particular Article 3. Expressly written in Article 3 is the presumption of COMI being where the registered office of a company is—the presumption stands unless there is proof to the contrary. As to what sufficient proof would be, the Court examined Recital 13 and its guidance that the COMI should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.⁴² The Court read this to mean that any criteria to determine COMI must be objective and ascertainable. So, beginning with the presumption based on the location of registered office, any factors offered to rebut this and show a different COMI must be

⁴⁰ *Id.* at 3863-65.

⁴¹ *Id.* at 3867.

⁴² *Id.* at 3868; Regulation 1346/2000 recital 13.

objective and ascertainable by third parties, showing that “an actual situation exists which is different from that which locating it at that registered office is deemed to reflect.”⁴³

The CJEU, in Grand Chamber, found that Eurofood’s COMI must be in Ireland, based on the framing of the referred question.⁴⁴ The Irish court asked about a regularly operating company with its registered office in Ireland. The CJEU insisted on objective factors that are ascertainable to third parties to establish a COMI in Italy. The Court thankfully filled in that definition by providing the helpful example of offering proof that a company is a “letter-box company” to rebut the registered office presumption.⁴⁵ By contrast, and on point in this case, the mere fact a parent controls or makes economic choices for its subsidiary from another member state is not enough to rebut the presumption and shift the COMI.⁴⁶

D. Location of COMI When an Entity Has Moved Offices—*Interdil*

While *Eurofood* gave some definition and broad outlines of what the CJEU felt would be the objective standards for defining COMI in a case where it was questionable because there was a debate over establishment in different companies, the case did not focus on forum shopping or avoidance with clearer facts or more questionable behavior. *Interdil* is a more recent case under Regulation 1346/2000.⁴⁷ It presented starker facts about the regulation’s anti-forum shopping provisions and how they will be employed in the courts and how the CJEU will resolve the definition of COMI when the debtor is transient between member states.

⁴³ Eurofood IFSC Ltd, at 3868.

⁴⁴ *Id.* at 3879 (1st paragraph of ruling, deciding the referred question).

⁴⁵ *Id.* at 3868.

⁴⁶ *Id.* at 3869.

⁴⁷ Case C-396/09, *Interdil Srl*, in liquidation, 2011 E.C.R. I-09915.

Interdil was an Italian company with a registered office in Italy. On July 18, 2001 its registered office was transferred to London, becoming a registered U.K. Foreign Corporation. On the next day, Interdil was also removed from the register of Italian companies. In the months that followed Interdil transferred title to some of its Italian properties to a British entity and eventually sold itself to a separate British company, Canopus. On July 22, 2002, Interdil was removed from the U.K. register of companies.⁴⁸

On October 28, 2003, a creditor named Intesa filed a suit in Italian court to open insolvency proceedings against Interdil. Interdil challenged jurisdiction of the Italian court claiming it had moved its registered office and operations to the U.K. in 2001 and had not been an Italian company—in other words, its COMI was in the U.K., so any insolvency proceedings would have to occur there and be litigated under English law, which would be more favorable and flexible for the debtor than the Italian forum.⁴⁹

The Italian courts wrestled with this issue for some time, but on May 20, 2005 the Corte suprema di cassazione declared that the Italian courts had jurisdiction.⁵⁰ It read Article 3(1) of Regulation 1346/2000 and found that the presumption of COMI at the location of the debtor's registered office had been rebutted because: Interdil owned real property in Italy; there was lease negotiated by Interdil for two hotel complexes; Interdil had a contract with a bank; and the local register of companies in Bari did not receive notice of Interdil's transfer of its registered office to London.⁵¹ This decision sent the case back to the court of original jurisdiction for the proceeding, the Tribunale di Bari.

⁴⁸ *Id.* at 9944.

⁴⁹ *Id.*

⁵⁰ *Id.* at 9945

⁵¹ *Id.*

The Bari court doubted the validity of the decision in light of *Eurofood*, and stayed the proceedings and referred several questions to the Court of Justice.⁵²

There were four questions referred, but three are of interest in interpreting Regulation 1346/2000 both broadly and in terms of identifying COMI. The first was a broad question: were COMI and Article 3(1) of the regulation to be interpreted in accordance with European Union law or national law?⁵³ The second question was more about the sufficiency of proof for rebutting the registered office presumption: can the COMI presumption based on registered office be rebutted by showing that the company carries on genuine business activity in a member state other than the one with its registered office, or is the bar higher and it must be shown that there is no business activity in the state where its registered office is located?⁵⁴ Thirdly, of note here for defining Interedil's COMI, do the factors that the Corte suprema di cassazione relied on (the property, the lease, the contracts, and the lack of notice) successfully rebut the registered office presumption of COMI to locate the main proceedings, and as a follow-up, are they sufficient to be considered as having an "establishment" for the purposes of secondary proceedings under Article 3(2)?⁵⁵

The CJEU answered the question of using European Union law versus national law for the interpretation of Article 3(1) clearly and succinctly in favor of European Union law. It cited its ruling in *Eurofood* as its justification and did so unambiguously: "With regard in particular to the term [COMI]...the [CJEU] held, at paragraph 31 of *Eurofood*, that the concept is peculiar to the Regulation, thus having an autonomous

⁵² *Id.*

⁵³ Interedil, at 9945.

⁵⁴ *Id.* at 9946

⁵⁵ *Id.*

meaning, and must therefore be interpreted in a uniform way, independently of national legislation.”⁵⁶

As for the questions regarding the rebuttal and if Intesa raised enough to rebut the presumption of Interdil’s COMI, the Court went more in depth, but certainly did not clear up the question of sufficiency. The CJEU began its opinion by discussing the easy case of a company with a registered office in a member state where much of its operations and economic activities take place. In such a case, the registered office presumption is wholly applicable if not irrebuttable.⁵⁷ However, the Court did not clear up the hard cases where there is not such a clear match. Again asserting that the COMI presumption in favor of registered office can be rebutted by objective factors ascertainable to third parties (reaffirming *Eurofoods*), the Court gave factors such as taking into account where the debtor pursues economic activities and all the places where it holds assets, insofar as those places are ascertainable to third parties.⁵⁸ However, the general guidance stopped there as the Court adopted the Advocate General’s position that those factors must be assessed in a comprehensive manner, with account being taken of the individual circumstances of each particular case.⁵⁹ In other words, there must be a thorough case-by-case determination.

When the Court did examine the factors presented to it to rebut the registered office presumption in Interdil’s case, the Court found that the lease, the contracts, and the real property may in fact be objective and could lead a third party to ascertain that the

⁵⁶ *Id.* at 9953

⁵⁷ *Id.* at 9955, 9961.

⁵⁸ *Id.* at 9956.

⁵⁹ *Id.*

true center of operations and management were in fact in Italy.⁶⁰ However, noting its pronouncement of the requirement of a comprehensive review in each case, the CJEU found these factors would be insufficient without a comprehensive review of all of the objective factors in Interdil's particular case to rebut the presumption of its COMI being in the same location of its registered office.⁶¹ The Court found that without a comprehensive review it would be insufficient to overcome the legislative intent of the European Union to locate the COMI in the U.K., as Interdil's registered offices were there, simply because it carried on economic activity in another member state. It did not however close the door on the idea that such a rebuttal could be successful—only that without such a comprehensive review the CJEU could not affirm these factors the power of law in fixing a debtor's COMI in conflict with the location of its registered office.⁶²

E. COMI and Timing of When Established—When the Debtor has Moved After the Opening of Proceedings—*Staubitz-Schreiber* and its relation to *Interdil*

Interdil again found a vague, but strong presumption of COMI as co-located with the registered office of the debtor. There was a concern that Interdil as a company was in fact forum shopping by becoming a registered company in the U.K. before selling itself and that it was hiding behind more favorable English law when facing creditors. Because it moved itself within a short time of being brought to court, there was a hint of forum shopping behind the case. However, the CJEU ruled that if the registered office is moved prior to the opening of insolvency proceedings, the presumption of its COMI being in the member state of the newly registered office will in fact travel with that

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 9961.

office.⁶³ The legislative intent of Regulation 1346/2000 certainly was to prevent forum shopping, however the language of the Regulation also plainly attached the presumption to the location of registered office. One reason the CJEU stuck to this preference for the registered office presumption was its prior ruling in the case *Staubitz-Schreiber*.⁶⁴ Although subject of the case was an individual debtor, its ruling on when COMI is established temporally to determine jurisdiction and forum for main proceedings is informative for all insolvency proceedings under Regulation 1346/2000.

Susanne Staubitz-Schreiber was a resident of Germany and had a sole proprietorship selling telecommunications equipment and accessories. Her business ceased operating in 2001 and on December 6, 2001 she requested the opening of insolvency proceedings regarding her assets in the German courts. On April 1 2002, she moved her residence to Spain. Shortly after this, on April 10, 2002 the German court refused to open the proceedings because it declared she had no assets to rule on. She appealed this decision, but the German appellate court dismissed her appeal for lack of jurisdiction because it said no German court can even open an insolvency proceeding now due to the fact she has moved her center of main interests to Spain.⁶⁵ Staubitz-Schreiber then appealed this decision asserting that jurisdiction must be decided in the light of the debtor's COMI at the time of application for the opening of insolvency proceedings.⁶⁶ At this point proceedings had not been opened as she moved to Spain between the application and the lower German court's decision to not open the proceedings on April 10, 2002. Undoubtedly, her COMI had shifted and the proceedings

⁶³ Interdil, at 9957.

⁶⁴ Case 01/04, Susanne Staubitz-Schreiber, 2006 E.C.R. I-00701.

⁶⁵ *Id.* at 726.

⁶⁶ *Id.*

were not in fact opened yet. The question before the CJEU, in Grand Chamber, was “Does the court of the Member State which receives the request for the opening of insolvency proceedings still have jurisdiction to open insolvency proceedings if the debtor moves the [COMI] to the territory of another Member State after filing the request but before proceedings are opened, or does the court of that other Member State acquire jurisdiction?”⁶⁷

Given the concern within the regulation about the transfer of assets and litigation to more favorable member states, the CJEU found that Regulation 1346/2000 must be interpreted to find examine COMI at the time of the request or application for the opening of insolvency proceedings.⁶⁸ The Court was concerned that the purpose of the regulation would be frustrated if a debtor was able to apply for insolvency proceedings to be opened in one member state and then be able to move its COMI to another member state in the interim before a court could officially take jurisdiction and declare the proceedings opened and begin enforcement.⁶⁹ *Staubitz-Schreiber*’s precedent and ruling can be seen as having influenced *Interedil*, with the CJEU favoring a fixed and hard-to-rebut presumption for COMI. *Interedil*’s move to the U.K. was temporally insignificant to the court in light of the presumption in favor of the registered office location being the COMI because of *Staubitz-Schreiber*’s ruling that the COMI is judged from the time that request was filed. Even the inference of choosing forums near in time to the date of application won’t be significant in the analysis of COMI due to the plain language of the regulation and the high bar of the registered office presumption.

⁶⁷ *Id.* at 727.

⁶⁸ *Id.* at 728.

⁶⁹ *Id.*

F. Does the Regulation 1346/2000 COMI Concept Prevent Forum Shopping?

While this can give a debtor some confidence that the location of its COMI will be respected once the application is submitted, and there is a strong presumption in favor of finding the COMI in the member state where its registered office is located, this leaves some doubt as to whether the debtor is in fact prevented from forum shopping. The cases seem to show a CJEU that is more concerned with ensuring respect for European Union legislation and a plain and uniform interpretation of Regulation 1346/2000 by the member states even in the face of leaving open the possibility that forum shopping can continue. The strong presumption of Article 3(1) in favor of a registered office was found to not be rebutted by timing issues (*Interdil* and *Staubitz-Schreiber*), issues related to control (*Eurofood*), or issues related to where economic activity is taking place absent a comprehensive, individual assessment (*Interdil*).⁷⁰ Only in dicta in *Eurofood* did the CJEU find that a true “letter-box company”, with only an address in a member state, would not deserve the presumption of its registered office location being its COMI for forum and jurisdiction under Regulation 1346/2000.⁷¹

So the question remains—does Regulation 1346/2000 and its jurisdiction based on a debtors COMI prevent abuse of the insolvency process in the European Union? If a debtor can smartly plan its COMI, then the answer is probably not. With insolvency law being such a large part of the modern business environment, and the regulation itself having had such a tortured history before finally being implemented, the E.U. placed in the body of the regulation an article requiring periodic review of Regulation 1346/2000. Article 46, required the Commission to produce reports about the application of the

⁷⁰ See *Eurofood*; *Interdil*; *Staubitz-Schreiber*, *supra*.

⁷¹ *Eurofood* at 3868.

Insolvency Regulation. The first would be due on June 1, 2012 (one day after the the 10-year anniversary of the law going into effect) and then there would be follow-up reports due every 5 years thereafter.⁷² This forethought to require review proved prescient at the time and the process forced the Commission and the other E.U. bodies to examine the track record of the regulation in light of the purposes it was meant to serve and some of the controversy that it produced. The CJEU played no small role in the regulation's effect either with its decisions handed down, many in Grand Chamber. The review process did in fact lead to reform efforts and eventually a recast insolvency regulation.

III. Reform and Regulation 2015/848

The European Union began its review process in the midst of the Great Recession. There was grave concern that the economic crises affecting the world and the European Union member states could undermine the E.U. itself. The Commission very much wanted to ensure as a political priority that it took measures to ensure economic growth and prosperity.⁷³ As noted above, there was a review and report process mandated by Article 46 of Regulation 1346/2000. The European Parliament formally began this process by adopting a resolution in November 2011 calling for a revision of the insolvency regulation.⁷⁴ The E.U. experience with the application of Regulation 1346/2000 and the economic slowdowns and crises of the period drove the Parliament and the Commission to look for legislation, in other fields as well as with insolvency

⁷² Regulation 1346/2000 art. 46.

⁷³ *Communication from the Commission on a New Approach to Business Failure and Insolvency*, at 2, COM (2012) 742 final (Dec. 12, 2012) [(Hereinafter Communication of 2012)].

⁷⁴ European Parliament Resolution of 15 November 2011, P7_TA(2011) 0484, 2013 O.J. (CE 153) 1.

policy, that would create a more harmonization among the member states for a business-friendly environment in the E.U.⁷⁵ When the Commission proposed a revised insolvency regulation in December 2012, it cited the great need for a European mechanism to control the proceedings for insolvency: from 2009-2011 200,000 firms went bankrupts per year in the E.U. and one quarter of those had a cross-border effect.⁷⁶

The proposals were very aspirational. As part of its plan for growth and a business-friendly internal market, the Commission sought to have the new regulation cover not only insolvency proceedings involving liquidations (as ends up being the case in many member states that govern insolvency mainly by appointing a liquidator or receiver to wind-up the business by marshaling, selling, and distributing the debtor's assets), but also reorganizations and proceedings under court supervision that can arise before the entity is insolvent.⁷⁷ In this way, more businesses would be able to survive and have a better chance to prosper as a going concern going forward. Also, there was much concern for the principle of a "second-chance" for honest, but failed entrepreneurs.⁷⁸ Efficient discharge and more favorable treatment during the proceedings to the unfortunate owners would encourage entrepreneurs to start over fresh and remove barriers for future business activity.

Besides the expansion of the scope of the next insolvency regulation, the Commission proposed an insolvency register in the hope that transparency of the proceedings would help overall efficiency, promote fairness and notice to creditors, and

⁷⁵ Communication of 2012 at 2.

⁷⁶ *Id.*

⁷⁷ *A Proposal for a Regulation of the European Parliament and of the Council Amending Council Regulation (EC) No 1346/2000 On Insolvency Proceedings*, at 5, COM (2012) 744 final (Dec. 12, 2012) [hereinafter Proposal of 2012].

⁷⁸ Communication of 2012 at 5.

prevent dueling proceedings on other member states.⁷⁹ Another area for revision was the process for dealing with groups, the proceedings that occur affecting cross-border companies when they are members of groups. Lastly, and most applicable to the discussion, the Commission tweaked the concept of COMI.

A. Review of Regulation 1346/2000 and COMI

While the proposals for a new regulation with some differences from Regulation 1346/2000 might have been an implicit critique of the application and effectiveness of the insolvency regulation, the Commission also issued a report to the Parliament and the Council, contemporaneously with the proposals, on its assessment of the application of Regulation 1346/2000.⁸⁰ The Commission's studies and research found that the regulation "is generally regarded as a successful instrument for the coordination of cross-border insolvency proceedings in the Union."⁸¹ However, there were shortcomings in some areas (those discussed *supra*, namely need for reorganizations, transparency, and groups). An important area for reform was of course the rules governing jurisdiction, and therefore the definition of COMI as a concept to fix jurisdiction.⁸²

The Commission noted that its surveys and public consultations found that 77% of respondents favored the concept of COMI as being what fixes jurisdiction for insolvency proceedings.⁸³ However, 51% said that the interpretation of the COMI

⁷⁹ Proposal of 2012 at 8.

⁸⁰ *Report From the Commission On the Application of Council Regulation (EC) No 1346/2000 On Insolvency Proceedings*, COM (2012) 743 final (Dec. 12, 2012) [hereinafter the Report of 2012].

⁸¹ *Id.* at 4

⁸² *Id.*

⁸³ *Id.* at 9.

concept has produced practical problems.⁸⁴ That being conceded, the Commission still went on to assert, “The case law of the CJEU clarified the concept of COMI in its decision *Eurofood and Interdil*.”⁸⁵ The Commission, despite the apparent split among the public as to the practical workability of using COMI seemingly had accepted the ideas that the Regulation was correct in the broad sense to use COMI and that the CJEU was completely correct in its interpretation of the concept. The real concern that the Commission had was a seemingly disparate application of the rebuttal requirements for the registered office presumption. Namely, it found through its research that in 14 member states (including the U.K., Germany, France, Italy, Spain, and the Netherlands) the presumption was being rebutted without the “comprehensive” analysis the CJEU required in *Interdil*.⁸⁶

The Commission also found fault with Regulation 1346/2000 for its lack of an express requirement for a national court to find jurisdiction as part of its decision to open proceedings.⁸⁷ Regulation 1346/2000 relied on courts of member states being guided by the general principles of efficiency and non-discrimination. It obviously favored the processes of the courts that were under an obligation to make an inquiry into their own ability to accept a case prior to opening the proceedings because of the serious ramifications that judgments and rulings will have throughout the E.U., being binding on other courts through the principle of mutual trust and the regulation itself.⁸⁸

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 10.

⁸⁸ See Report of 2012 at 10, Section 3.2: The Commission obviously feels a procedural inquiry into jurisdiction at the outset would lend certainty and finality for parties once litigation has commenced.

B. Provisions of the New Regulation—Regulation 2015/848 and Jurisdiction

The new insolvency regulation was passed on May 20, 2015.⁸⁹ Parliament and Council Regulation 2015/848 is a longer and more comprehensive regulation than Regulation 1346/2000—it has 89 recitals and 92 articles. As a regulation for harmonization, it will not go into effect for two years, becoming binding on all insolvency proceedings as of June 26, 2017.⁹⁰ The provisions on establishment of national insolvency registers and their linking together across the EU have extra time to take effect, not becoming required till 2018 and 2019 respectively.⁹¹

As for the prevention of abuse, the recitals almost immediately state a need to prevent forum shopping because of its deleterious effects on the proper functioning of the internal market.⁹² However, a closer examination of the substantive provisions of the jurisdictional rules for opening insolvency proceedings reveals only the codification of the CJEU case law regarding COMI. There is a new provision to prevent the most flagrant abuse by creating a three month time period for which a firm could not open insolvency proceedings after shifting its COMI to another member state, but this is a very small window and for the most part the new regulation reinforces the old approach under Regulation 1346/2000 and its construction by the CJEU.

To begin with the new regulation finds its legal basis by invoking Article 81 of the TFEU, authorizing measures for judicial cooperation of civil matters and in furtherance of the EU and member state shared competence of legislating in the area of

⁸⁹ European Parliament and Council Regulation 2015/848 On Insolvency Proceedings, 2015 O.J. (L 141) 19.

⁹⁰ Regulation 2015/848 art. 84.

⁹¹ Regulation 2015/848 art. 92.

⁹² Regulation 2015/848 recital 5.

freedom, security, and justice.⁹³ In its recitals, the new regulation explicitly reaffirms that the presumption of registered office as COMI remains.⁹⁴ And, as laid out in *Eurofood* and *Interedil*, the presumption can only be overcome after a comprehensive review of all the objective factors that would be ascertainable to a third party showing the entity is actually managed and administered in a member state other than the state where its registered office is.⁹⁵ However, the next recital warns that a debtor will not be entitled to a presumption of COMI in the state of its registered office if, in the case of a company or an individual in a business capacity, the debtor has moved its registered office to a new member state within a three month period prior to applying for the opening of insolvency proceedings.⁹⁶

An interesting addition in Regulation 2015/848 is the mandated examination of jurisdiction in Article 4.⁹⁷ Article 4(1) mandates the national courts to examine its own jurisdiction in a case upon the request for the opening of any proceedings. This apparently is to alleviate the prior concerns with dueling jurisdictions and the binding effect that any judgments will have if conflicting. Also, this is designed to lead to a clearer application of the doctrines governing COMI, considering that now even without a challenge to jurisdiction, the court upon its own motion will examine the basis for jurisdiction at the beginning of any case before the official opening of any proceeding in the member state.

⁹³ TFEU arts. 81 and 4.

⁹⁴ Regulation 2015/848 recital 30 and art. 3(1).

⁹⁵ *Id.*

⁹⁶ Regulation 2015/848 recital 31 and Article 3(1).

⁹⁷ Regulation 2015/848 art. 4.

There are other reforms in Regulation 2015/848. It establishes of the registries for reporting on the opening of insolvency proceedings and aims to connect them through all member states.⁹⁸ There is some more clarity given to the relationship between main and secondary proceedings.⁹⁹ The scope of the insolvency regulation has been broadened to attempt to harmonize the proceedings governing reorganizations as well as liquidations in insolvency.¹⁰⁰ Finally, there are provisions to allow group coordination of proceedings when many companies under one group are involved with cross-border effects.¹⁰¹ However, substantively the only change to the anti-abuse and forum shopping-prevention measures were the codification of CJEU decisions on the construction and interpretation of COMI principles, and the loss of a presumption for a debtor that moves is registered office within three months of applying for the opening of insolvency proceedings.¹⁰² This does little to nothing to fill the gaps the legislation and CJEU interpretations left open for companies to squeeze into more favorable forums, at least as long as they wait three months prior to doing so.

IV. Conclusion—Regulation 2015/848 Doesn't Fix Questions About Forum Shopping and Jurisdiction

Regulation 2015/848 is an aspirational piece of legislation rather than a practical one. Insolvency law has a tortured history in the European Union. It took decades of dialogue and failed attempts to even approach a comprehensive E.U. insolvency regime.

⁹⁸ Regulation 2015/848 arts. 24 and 25.

⁹⁹ Regulation 2015/848 arts 34-52.

¹⁰⁰ Regulation 2015/848 art. 1 and annex A.

¹⁰¹ Regulation 2015/848 arts. 56-77.

¹⁰² See Regulation 2015/848 art. 3.

In truth, what eventually went into effect, Regulation 1346/2000 wasn't even that—it was a set of rules and expectations for national courts to apply their own substantive laws to cross-border insolvent debtors, often as they were placed in liquidation, receivership, or some kind of administration. The regulation was a large step forward in that it attempted to set a standard for the location of “main proceedings”, which would bind courts and parties alike through the judgments and orders of the court there. And using the concept of a debtor's COMI, it would fix the jurisdiction for the main proceedings so that the regulation would not tolerate the abuse of forum shopping by debtors. However, clearly the old regulation left quite a bit of open space as to where a debtor could choose to resolve its insolvency issues and the CJEU did little to clarify in the cases noted except to demand objective and ascertainable proof of administration somewhere else other than the member state in which the debtor had its registered office. While this is a start, this does little to add certainty to debtors and creditors alike in a complex and diverse internal market when they are in court for insolvency.

Regulation 2015/848 identified jurisdiction as an issue that should be revised. The Commission in its own assessment of the weaknesses in the application of Regulation 1346/2000 identified that over half of the respondents to inquiries and studies found the COMI concept of 1346/2000 and the CJEU as problematic in practice. If there are practical problems with identifying a debtor's COMI, then the door will be open for those with the means and the motivations to abuse the system and exploit loopholes to forum shop themselves into a member state with more beneficial laws. There was a great chance for the E.U. to fill the gaps and respond to these criticisms and prevent abuse, but it chose not to. It only codified case law, required national courts to rule on their own

jurisdiction, and created a three month period in which a move of a registered office prior to applying for insolvency proceedings would be too close for the presumption of COMI to apply.

In its 29th Recital, Regulation 2015/848 says, “This Regulation should contain a number of safeguards aimed at preventing fraudulent or abusive forum shopping.”¹⁰³ However, besides the very weak three-month period in which a company that moves its registered office would lose the presumption of a co-located COMI, there is no substantive change to E.U. law in this regard. The reinforcement of the language of Regulation 1346/2000 caveated by the express adoption of CJEU case law simply holds the old system in place. Perhaps the strongest hope comes in Regulation 2015/848’s review procedure. Like Regulation 1346/2000, the new regulation mandates a review and report within 10 years of being effective on the application of regulation 2015/848.¹⁰⁴ Additionally though, the regulation also demands that the Commission shall submit a study on the issue of abusive forum shopping no later than June 27, 2020.¹⁰⁵ That will be three years after the effective date of the regulation. Perhaps this will be the next best chance to address the issue of forum shopping, and maybe this time, the E.U. won’t punt the issue further down the road.

¹⁰³ Regulation 2015/848 recital 29.

¹⁰⁴ Regulation 2015/848 art. 90(1).

¹⁰⁵ Regulation 2015/848 art. 90(4)